

PUBLIC COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

12-80

In re the Matter of

COMPLAINT OF SKY ANGEL U.S., LLC

Against Discovery Communications, LLC, *et. al.*
For Violation of the Commission's Competitive
Access to Cable Programming Rules

To: Media Bureau

File No. CSR-8605-P

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MAR 24 2010

Federal Communications Commission
Bureau / Office

PROGRAM ACCESS COMPLAINT

SKY ANGEL U.S., LLC

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March 24, 2010

Its Attorneys

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Summary

Sky Angel U.S., LLC ("Sky Angel"), a multichannel, Internet-protocol ("IP") based video programming distributor, provides family-friendly programming on a nationwide basis at affordable rates. Sky Angel brings this Complaint against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively "Discovery") because of Discovery's continued, unreasonable and unjustified threats to terminate an existing Affiliation Agreement between the parties and to begin withholding Discovery programming from Sky Angel as of April 22, 2010.

Sky Angel, a relatively new company, was the first American MVPD to utilize IP technology to provide video programming directly to America's television sets on a nationwide basis. Undoubtedly, this type of innovative system and method of distribution is part of what the Commission envisioned in adopting its program access requirements and later in creating *The National Broadband Plan*. And it is what established MVPDs, such as Discovery's affiliates, fear could loosen their stranglehold on our nation's video distribution marketplace and cut into the profits they currently reap from tens of millions of Americans. With the advent of broadband service to currently unserved and underserved areas, MVPDs such as DirecTV, a Discovery affiliate, fear competition from distributors such as Sky Angel.

Discovery's threatened unfair method of competition and unfair acts are designed to hinder Sky Angel's continued growth and the possibility that Sky Angel emerges as a viable competitor to the now-dominant cable and satellite MVPDs. In so doing, Discovery also discriminates against Sky Angel. Other MVPDs, such as Comcast and Time Warner through their TV Anywhere services, currently distribute Discovery programming via the Internet. As noted by Discovery's in-house counsel, the primary difference between Sky Angel's service and that of Comcast and Time Warner is that the latter two MVPDs have 30 million customers.

Although Sky Angel has repeatedly sought an explanation for Discovery's threatened termination of the Affiliation Agreement and attendant withholding of its programming, Discovery has refused to offer any explanation beyond the fact that upper level management at Discovery is "uncomfortable" with Sky Angel's distribution methodology. Certainly, this does not satisfy the reasonableness standard imposed both either applicable contract law or the Commission's program access regulations.

The reality is that, at all times, Sky Angel timely paid the license fees to Discovery required under the Affiliation Agreement. Discovery never complained about any aspect of Sky Angel's distribution of programming, nor has it questioned the security or integrity of Sky Angel's system. In fact, as recently as September 2009, Discovery urged Sky Angel to expand the number of Discovery channels it distributed.

For these reasons, the Commission first should impose an immediate standstill of the Affiliation Agreement pending resolution of the Complaint. Discovery's threatened termination date of April 22, 2010 occurs prior to the end of the pleading cycle of a program access proceeding, let alone before the Commission will have an opportunity to rule on the merits of Sky Angel's Complaint. Sky Angel simply asks that the Commission maintain the *status quo* in order to prevent Sky Angel from suffering potentially irreparable harm. Subsequently, the Commission should find that Discovery's withholding of its programming from Sky Angel would violate the Commission's program access rules and order Discovery to continue to provide its programming to Sky Angel pursuant to the terms of the Affiliation Agreement.

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PROGRAM ACCESS COMPLAINT

Sky Angel U.S., LLC ("Sky Angel"), by its attorneys, and pursuant to Sections 76.1000, 76.1001, 76.1002, 76.1003 and 76.7 of the Commission's rules, hereby submits this Complaint against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively "Discovery"), due to overtly unfair and discriminatory practices and actions taken by Discovery against Sky Angel in violation of the Commission's rules intended to promote competitive access to non-broadcast programming. This Complaint is based on the following and is supported by the attached documents and declarations.

I. Background

A. Sky Angel's Service

Sky Angel is an affordable, nationwide subscription-based service dedicated to serving the informational, entertainment, spiritual and educational interests of America's families. Sky Angel is a multichannel video programming distributor ("MVPD") that makes available approximately 80 channels of video and audio programming that are entirely family-friendly. Sky Angel's nationwide subscription service utilizes advanced Internet Protocol Television

("IPTV") technology, and is available to any consumer who has broadband Internet access via DSL, wireline or wireless connections.¹

To enjoy the service, a Sky Angel subscriber receives a small digital set-top box that has a broadband Internet input and video outputs that directly connect to a television set. Through the broadband Internet input, the set-top box receives encrypted video programming data from Sky Angel which is then decoded and sent to the subscriber's connected television set. An HD version of the set top box is in research and development, and Sky Angel expects it to be commercially available within the next few months. Sky Angel's IPTV service is extremely secure from unauthorized uses of any kind and does not interfere with, or preclude the use of, other entertainment delivery systems, such as satellite, cable or over-the-air television. Sky Angel believes that it is the Nation's first provider of a nationwide, real-time linear channel IPTV-based service, although undoubtedly many more will follow. IPTV distribution certainly will be an important feature of national broadband services for generations to come.²

Sky Angel has invested two years and more than 15 million dollars in developing its IPTV service. Sky Angel's highly sophisticated operations use the latest in IP technology to deliver an extremely secure, high-quality digital real time TV service to its subscribers.

Attachment A to this complaint contains a description of Sky Angel's sophisticated systems.³

Now, however, unexplained, unjustified and anticompetitive action taken by Discovery threatens Sky Angel and its innovative use of broadband for multichannel video programming distribution.

¹ For additional information, please see <http://www.skyangel.com>.

² See, e.g., *Connecting America: The National Broadband Plan*, pp. 18, 50-51 (2010).

³ Sky Angel is requesting that the Commission withhold this description from public inspection because it contains proprietary and confidential information.

B. The Affiliation Agreement

On October 3, 2007, Sky Angel entered into a mutually beneficial "Affiliation Agreement" with Discovery, under which Discovery agreed to provide several of its programming channels to Sky Angel for distribution on its IPTV system in return for monthly license fee payments paid by Sky Angel to Discovery based upon the number of subscribers to Sky Angel's service. The Agreement specifically provides for distribution of the Discovery Channels by IPTV technology and "IP" is a defined term in that Agreement. A copy of the Affiliation Agreement is attached to this Complaint as Attachment B. Discovery requires in the Affiliation Agreement that its terms be confidential, so it is being filed under a request to the FCC that it be withheld from public inspection.

Consistent with its mission to provide entirely family-oriented programming, under the Affiliation Agreement Sky Angel has been distributing the Discovery Channel, Animal Planet, Discovery Kids Channel, Discovery Home Channel (now known as Planet Green) and the Military Channel for approximately two and a half years. Some of those channels have become among the most popular provided by Sky Angel and are "must have" channels.

Indeed, the success of the various Discovery channels on the Sky Angel system prompted Discovery to urge Sky Angel as recently as this past fall to expand its lineup of Discovery programming. During August and September 2009, approximately two years after entering into the Affiliation Agreement, Discovery aggressively urged Sky Angel to add its Science Channel to its lineup – of course, subject to the monthly payment of additional subscriber-based fees. In addition, in the proposed contract provided to Sky Angel by Discovery, Discovery required Sky Angel to enter into additional commitments to add more Discovery programming channels as the Sky Angel system continued to grow. Attachment C to this Complaint is a copy of September

2009 communications between Discovery and Sky Angel in which Discovery presses Sky Angel to distribute additional Discovery channels. Attachment D to this Complaint is a copy of the proposed Science Channel Agreement provided to Sky Angel.

C. The Dispute

In mid-December 2009, Tom Scott, President of Sky Angel, received a telephone call from Ms. Elisa Freeman of Discovery. Ms. Freeman stated that she was calling from a car in Brazil and that she had others in the car with her. She stated that her management had decided that Discovery was "uncomfortable" with Sky Angel's distribution system and that Sky Angel would be receiving a letter stating that Discovery would terminate the Affiliation Agreement. When Mr. Scott of Sky Angel sought an explanation, Ms. Freeman only would offer that Discovery's management was "uncomfortable" with Sky Angel's distribution methodology and that the termination of the agreement with Sky Angel was "coming from on top." When Mr. Scott asked what it was that made Discovery uncomfortable, Ms. Freeman repeated that it was coming from "on top" and that she could conference in her attorney if Mr. Scott required further explanation. Mr. Scott asked Ms. Freeman to bring in her attorney and she conferenced in Discovery's in-house counsel, Mr. Stephen Kaminski.

Mr. Kaminski repeated Ms. Freeman's statement that Discovery was "uncomfortable" with Sky Angel's distribution methodology and that Sky Angel would be receiving a letter of termination. Mr. Scott asked Mr. Kaminski what about the system in particular made Discovery uncomfortable. Mr. Kaminski stated that it was coming from "the top." Mr. Kaminski would not share any explanation of what made Discovery "uncomfortable."

Mr. Scott advised Mr. Kaminski of the importance of the Discovery programming to Sky Angel; that the loss of five popular channels would be a significant loss to Sky Angel and

undoubtedly cost Sky Angel many customers. Mr. Scott stated that Sky Angel could not address Discovery's concerns without knowing the basis of why Discovery was "uncomfortable." Mr. Kaminski only repeated that being "uncomfortable" was coming from the top and that Sky Angel would be receiving a termination letter. Ms. Freeman stated that she had clients in the car and didn't want to discuss further and the call ended.⁴

A few days after the conversation among Ms. Freeman, Mr. Kaminski and Mr. Scott, Brian Collins, Sky Angel's Executive Vice President of Programming/Media Sales, called Ms. Freeman and was conferenced in with Mr. Kaminski in an attempt to ascertain what made Discovery "uncomfortable" so that Sky Angel could address Discovery's concerns. Without providing details, Mr. Kaminski informed Mr. Collins that Discovery was uncomfortable with Sky Angel's IP method of distribution, Sky Angel's advertisements, and the fact that Sky Angel's website communicated that Sky Angel's programming could be received anywhere in the United States. When Mr. Collins asked why Discovery had suddenly become uncomfortable two years into the term of the Affiliation Agreement, Mr. Kaminski told him it was a recent decision that had come from the upper levels of Discovery management. Mr. Collins then noted that Discovery programming also was being distributed through the Internet, directly to subscriber's computers, as part of the TV Anywhere services being offered by MVPDs such as Comcast and Time Warner. In response, Mr. Kaminski noted that Comcast and Time Warner have 30 million customers. When Mr. Collins informed Ms. Freeman and Mr. Kaminski that Sky Angel would not passively allow Discovery to terminate the Affiliation Agreement and withhold its

⁴ See Declaration of Thomas Scott, which is Attachment E to this Complaint.

programming from Sky Angel, both Ms. Freeman and Mr. Kaminski stated that Discovery is not afraid to go to court.⁵

As threatened, by letter dated January 22, 2010, Discovery notified Sky Angel that it would terminate the Affiliation Agreement unilaterally on April 22, 2010 even though the term of the agreement continues through December 31, 2014. A copy of that letter is Attachment G to this Complaint. In a letter that contained only a few sentences, Discovery declared that the entire "basis" for the termination was that Discovery, purportedly, "...determined that the distribution methodology used by and on behalf of Affiliate [Sky Angel] is not satisfactory." At no time before or after that letter has Discovery offered any explanation of how or why it had arrived at its "determination" that Sky Angel's distribution methodology is "not satisfactory."

In fact, Sky Angel's system provides high-quality digital television and easily satisfies any reasonable definition of "satisfactory." The system is extremely secure, relying on encryption technology and a specific set-top box. There has never been an incident of the system being "hacked," and Discovery and Sky Angel have never had a conversation with regard to such an issue. Discovery does not allege or otherwise claim that security is an issue.

Indeed, Sky Angel believes that its IP system is more secure than the TV Anywhere system under which Discovery channels are being distributed over the Internet. TV Anywhere permits direct access to video programming, including Discovery channels, by computer without the protection of encryption or a set-top box.

The IP System used by Sky Angel is state-of-the-art. Sky Angel uses back-end IP distribution technology provided by NeuLion of Long Island, NY.⁶ The same technology and

⁵ See Declaration of Brian Collins, which is Attachment F to this Complaint.

⁶ See Attachment A.

company is used by numerous video distributors⁷ – including, for example, many sports networks and other programming networks – and it was recently announced that DISH had reached an agreement with Neulion using the exact same technology provided to Sky Angel to deliver DISH'S international programming in the U.S.⁸ The current DISH international offering includes the channel Discovery Español. It is reasonable to believe that Discovery has granted permission to DISH to include that channel in DISH's IPTV offering.

Sky Angel believes that, under the Affiliation Agreement, Discovery has the authority to terminate lawfully only for good cause. For example, Discovery has the right to terminate if security failures equal or exceed 10% of Sky Angel's subscribers. Even then, however, the Affiliation Agreement requires notice and provides a five-day period for Sky Angel to cure the failures. In addition, Discovery is under a legal obligation to act in good faith and deal fairly with Sky Angel.⁹ Sky Angel is confident that there have been no security failures. Discovery has never alleged that there have been any quality issues or security failings, nor has Discovery even had a discussion with Sky Angel about the quality or security of the Sky Angel IP distribution system.

In short, Discovery is threatening to terminate the Affiliation Agreement and withhold its programming from Sky Angel without cause or explanation.

In response to Discovery's threat of termination, on March 4, 2010, Sky Angel served a letter on Discovery stating that threatened termination of the Affiliation Agreement was unfair,

⁷ See *CellularVision of New York, L.P. v. SportsChannel Associates*, 10 FCC Rcd 9273, 9279 (1995) (“[O]ur conclusions with respect to the legitimacy of defendant's concerns about CellularVision's security system are buttressed by the fact that other satellite cable programming vendors have expressed their satisfaction with CellularVision's signal security system.”).

⁸ For more information, see www.neulion.com. Such broad use by the industry strongly indicates that the system is satisfactory and secure.

⁹ See *First National Realty Corp. v. Warren-Ehret Co.*, 247 Md. 652, 657, 233 A.2d 811, 813-14 (1967). Discovery and the Affiliation Agreement are subject to Maryland law.

unjustified and discriminatory. A copy of that letter is Attachment H to this Complaint. In the letter, Sky Angel asked Discovery to rescind its decision to terminate and offered to cooperate fully with Discovery to establish that its distribution methodology is in compliance with the Affiliation Agreement. As part of that letter, Sky Angel put Discovery on notice that it would seek legal recourse if Discovery did not rescind its threat to terminate, including complaining to the FCC under the program access rules due to Discovery's unfair practice and unfair discrimination, §76.1001 and §76.1002(b), respectively.

By letter dated March 19, 2010, Discovery responded to Sky Angel and offered nothing. Discovery merely repeated its contention that Sky Angel's distribution was "not satisfactory" with no other explanation or specific response to Sky Angel's letter. A copy of Discovery's March 19, 2010 letter is Attachment I to this Complaint.

II. Jurisdiction

Under its program access rules,¹⁰ the Commission prohibits unfair and discriminatory practices against MVPDs by certain classes of cable and satellite programming providers. From the perspective of a consumer, Sky Angel's service, which makes "available for purchase, by subscribers or customers, multiple channels of video programming,"¹¹ is indistinguishable from cable television. Sky Angel's subscribers connect the set-top box to a broadband Internet connection and to their television set in order to receive more than 80 linear, real-time channels.

The Sky Angel system allows a subscriber to choose from two packages of programming. The Faith Package has more than 37 channels of faith-based programming, including every major faith-based programmer in America. The Family Friendly Package, which contains the

¹⁰ Part 76, Subpart O of the Commission's rules.

¹¹ 47 C.F.R. §76.1000(e) (defining multichannel video programming distributor for purposes of the Commission's Competitive Access to Cable Programming rules).

Discovery channels that are the subject of this Complaint, includes more than twenty-five of America's best family friendly "cable" channels, including the NFL Channel, the MLB Channel, The Weather Channel, and Hallmark. These programming packages can be purchased separately or as a combined Faith and Family Package. All programming is encrypted and delivered as real-time linear channels to a subscriber's television set using a set-top box similar to that utilized by the cable and satellite industries. The five Discovery channels which are a part of the Family Friendly Package make up twenty percent of Sky Angel's total Family Friendly Package offering.

The Commission expressly determined that Discovery is subject to its program access rules as a satellite cable programming vendor.¹² The Commission reached that determination in the *DirecTV Order* because of Discovery's affiliations with Liberty Media, DirecTV and other cable and/or satellite cable programming vendors with which Sky Angel competes:

Like Liberty Media, Discovery is subject to the program access rules as a 'satellite cable programming vendor.'The rationale for imposing program access conditions on Liberty Media applies equally to Discovery. First, in the absence of any restrictions embodied in the rules or conditions, Discovery, like Liberty Media, would be able to withhold programming or price discriminate in favor of DIRECTV. Second, both Liberty Media and Discovery offer the type of nationally distributed, general interest programming that the Commission sought to address via the *News Corp.-Hughes* program access condition. That is, Liberty Media and Discovery each control popular programming networks that create similar nationally distributed and popular content without close substitutes. Third, Liberty Media and Discovery are situated similarly within the corporate hierarchy of entities controlled by John Malone. Malone holds attributable interests in Discovery Holding, Liberty Media, Liberty Global, and LCPR under the attribution standards applicable to the program access rules. He is well positioned to influence or even direct Discovery's decisions concerning whether or not to sell programming to an unaffiliated MVPD and how to set the prices, terms, and conditions of such sales. In addition, Liberty Media and Discovery Holding have interlocking directorates that could facilitate communication or cooperation leading to discrimination by Discovery in favor of DIRECTV and to the detriment of its MVPD competitors. Certain employees or officers of Liberty Media are also highly paid

¹² See *In the Matter of News Corporation and The DIRECTV Group, Inc.*, 23 FCC Rcd 3265 (2008) ("*DirecTV Order*").

executives of Discovery Holding, and, pursuant to a services agreement, Discovery Holding compensates Liberty Media for the services that these Liberty Media employees and officers render to Discovery Holding. The shared directors, officers, and employees could allow the firms in question to cooperate in a strategy designed to raise DIRECTV's rivals' prices for Discovery's programming, which would inure to DIRECTV's benefit through subscriber migration. After the transaction, therefore, Liberty Media and Malone unquestionably would be able to unduly influence the decisions of their attributable programming networks to improve DIRECTV's competitive position vis-à-vis its rivals.¹³

III. Cause of Action

On October 3, 2007, Sky Angel entered into the Affiliation Agreement with Discovery. That agreement, the form of which was provided by Discovery, specifically provided for Sky Angel's distribution of Discovery programming over Sky Angel's IPTV platform, as an "IP System."¹⁴ The expiration date of the Affiliation Agreement is December 31, 2014.¹⁵

At all times, Sky Angel timely paid the license fees to Discovery required under the Affiliation Agreement. Discovery never complained about any aspect of Sky Angel's distribution of programming. Discovery has never questioned the security or integrity of Sky Angel's system. In fact, as recently as September 2009, Discovery urged Sky Angel to expand the number of Discovery channels it distributed.

Then, without explanation, justification, or even an attempt to examine any aspect of Sky Angel's operations, by letter dated January 22, 2010, Discovery notified Sky Angel that it would terminate the Affiliation Agreement on April 22, 2010 – more than 26 months after launch of the Discovery Channels by Sky Angel and over fifty-six months before the end of the agreement's term – because the "distribution methodology" was "not satisfactory." Despite the fact that Sky Angel has repeatedly requested that Discovery describe what makes it "uncomfortable" with respect to Sky Angel's distribution methodology, Discovery never explained its "discomfort."

¹³ *Id.* at 3300-01 (citations omitted).

¹⁴ Affiliation Agreement, Sections 1.1, 1.1.2.

¹⁵ *Id.* at Section 1.11.

Similarly, Discovery has never explained why Sky Angel's distribution system is "not satisfactory." Discovery's refusal to explain was perpetuated in its letter of March 19, 2010. Discovery's continuing refusal to disclose any basis for its discomfort, or lack of satisfaction, has made it impossible for Sky Angel to address Discovery's concerns.

Sky Angel submits that Discovery is in violation of Section 76.1001 of the Commission's rules because its threatened unilateral, unjustified termination of the Affiliation Agreement constitutes an unfair method of competition, or an unfair or deceptive act or practice, the purpose or effect of which is to hinder significantly or prevent Sky Angel from distributing programming to its subscribers in competition with affiliates of Discovery.

Sky Angel also submits that Discovery is in violation of Section 76.1002(b) of the Commission's rules because its threatened unilateral termination of the Affiliation Agreement constitutes unlawful discrimination in the terms or conditions of the delivery of programming among competing MVPDs, unless Discovery is unilaterally terminating its distribution agreements with all other MVPDs without explanation or justification.¹⁶

As noted above, Sky Angel believes that Discovery permits distribution of its programming over the Internet via the TV Anywhere system and also under the Neulion system used by DISH. Attempting to crush IPTV competition by Sky Angel while permitting other, far larger distributors to carry Discovery channels through Internet distribution is another example of unlawful discrimination. The only distinction is that the other distributors are far larger and

¹⁶ See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3412 (1993) ("[O]ne form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors . . .").

more powerful than Sky Angel, or as Discovery's counsel stated, the proponents of TV Anywhere have 30 million subscribers.

These violations of the Commission's program access rules by Discovery clearly are anticompetitive actions intended to stifle competition from Sky Angel, an independent MVPD, against one or more program distributors affiliated with Discovery. Sky Angel provides a nationwide, broadband-based, video distribution service. Its competitors include other nationwide MVPDs, such as DirecTV.¹⁷ Any attempt by Discovery to target Sky Angel for termination in order to advance the interests of Discovery's affiliates would be a violation of Section 76.1002(a)'s prohibition against undue or improper influence.

Discovery is unlikely to admit to an anticompetitive motive. However, termination of Sky Angel's IPTV distribution, which is profitable to Discovery, based on nothing more than the hollow excuses that Discovery is "uncomfortable" with Sky Angel's distribution methodology, or that it is "not satisfactory," is nonsensical, especially in light of the clear permission for that methodology provided in the Affiliation Agreement.

The real question is: Why would a programmer suddenly become "uncomfortable" with a successful, state-of-the-art and high-quality distribution methodology which has never experienced a security lapse, is producing current revenues and promises to produce substantial future revenues?

Obviously, there is no legitimate, rational justification for Discovery's extreme action. As a programmer, Discovery should be very satisfied with the Affiliation Agreement. Sky Angel is providing additional distribution of Discovery's channels nationwide, in a highly family-

¹⁷ See *EchoStar Communications Corp. v. Fox/Liberty Networks LLC, FX Networks, LLC*, Memorandum Opinion and Order, 13 FCC Rcd 7394, 7402 (Cable Servs. Bur. Apr. 15, 1998) (finding that EchoStar, because it offers its services on a nationwide basis, "competes with cable operators in every franchise area in the continental United States.").

friendly environment. Discovery is being well compensated for that distribution of its programming at rates it required under the Affiliation Agreement. Indeed, the distribution of Discovery programming was so successful for Discovery that, as recently as September 2009, Discovery was pressuring Sky Angel to increase the number of Discovery channels it distributed, with increased license fees to be paid to Discovery.

Somehow, and with no explanation (other than being "uncomfortable" or "not satisfied"), between September 2009 and December 2009, Discovery transformed itself from a proponent of Sky Angel to an adversary. That about-face was not based on the program distribution business because Sky Angel timely paid all required license fees to Discovery and had never experienced any material distribution problems. Certainly, no problems have ever been identified or even alleged by Discovery.

Accordingly, one possible explanation for Discovery's stunning change of course, and apparently retaliatory action, was because Sky Angel was viewed to be a competitor to program distribution affiliate(s) of Discovery. As two representatives of Discovery told Sky Angel's management, the decision to terminate the Affiliation Agreement "came from on top." The Commission should presume that, under these circumstances, the decision to improperly terminate the Affiliation Agreement came from highly placed management that decided to cut Discovery's revenues derived from the Affiliation Agreement in order to support program distributors which compete with Sky Angel. In short, the harsh action taken by Discovery only makes sense if it is part of an attempt to stifle future MVPD Internet-based competition. Sky Angel believes this is an overt violation of the FCC's program access rules, an attempt to influence the outcome of the FCC's stated support of a nationwide broadband plan, and endorses

why the Commission expressly made Discovery subject to the program access rules when it permitted Discovery to become an affiliate of DirecTV and other distributors.

If Discovery succeeds in terminating the Affiliation Agreement under these tawdry circumstances, there would be a substantial chilling effect on the ability of others to invest in technology for the delivery of video and other broadband-based services. Probably, Discovery wants the Commission to believe that this situation merely is a contract dispute, but the issues here are much more profound. If Discovery is successful in disguising an attempt to influence the growth and distribution of IPTV, then effectively it can circumvent the program access rules by simply contending that it is "uncomfortable" with the distribution methodology.

Sky Angel understands that a programmer might have legitimate reasons to question a methodology, but that is not the case here. In twenty-six months under the Affiliation Agreement, Discovery never questioned the methodology and, to this day, has provided no basis to challenge the methodology. If Discovery is successful in terminating the Affiliation Agreement under these circumstances, it will have by-passed the program access rules and implicated the future of MVPD competition, especially the development of IPTV and other broadband service initiatives. At a minimum, Discovery should be required to make a coherent showing of why such methodologies are harmful to its programming offerings. Anything less undermines the enforceability of the program access rules and the Commission's specific decision to apply them to Discovery.

Discovery's cavalier treatment of Sky Angel is significant in itself. Discovery's improper behavior is exacerbated because it controls five to ten of America's most favored programming channels, which are necessary to the success of emerging and independent MVPDs, such as new

entrant Sky Angel.¹⁸ Moreover, Discover's affiliations with competing distributors, such as DirecTV, raise serious competitive issues and may dictate who will control access to broadband programming rights essential to the development of The National Broadband Plan.

IV. Relief Requested

Sky Angel requests that the Commission immediately order Discovery to continue to provide programming to Sky Angel under the terms of the Affiliation Agreement while the FCC considers this Complaint and conducts proceedings initiated by it. Such an action would preserve the *status quo* while allowing the Commission adequate time to resolve the issues in this case. A temporary standstill is necessary here because, as demonstrated above, Sky Angel is likely to prevail on the merits of its Complaint, Sky Angel will suffer irreparable harm absent a standstill (or stay) due to the "must have" popularity of Discovery programming among its subscribers, a standstill would not in any way harm Discovery because Sky Angel will continue to make payments in accordance with the Affiliation Agreement, and it would serve the public interest by continuing to provide Sky Angel subscribers with Discovery programming and by allowing Sky Angel to remain a viable competitor in the MVPD marketplace. For these reasons, concurrent with this Complaint, Sky Angel is filing a petition for temporary standstill, as recently permitted by the Commission.¹⁹

¹⁸ For example, very recently, on March 21, 2010, the Discovery Channel launched its new series *Life*. That evening, *Life* drew 11.8 million viewers for its first episode and 11.5 million for its second episode. Those ratings exceeded the ratings of three of the four national broadcasting networks. See *Viewers Discovery Discovery's Life*, by David Bauder, Associated Press (Mar. 24, 2010).

¹⁹ *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010). The newly adopted 47 C.F.R. §76.1003(l) will go into effect on the date announced by the FCC when a publication announcing OMB approval is in the *Federal Register*. Regardless, Sky Angel asserts that the Commission already possesses the authority to prohibit Discovery from withholding its programming from Sky Angel during the pendency of this complaint proceeding. See, e.g., 47 C.F.R.

Sky Angel is willing to participate in FCC-ordered alternate dispute resolution, such as mediation, or other appropriate procedures in order to resolve this matter efficiently, so long as Discovery's threat to terminate is forestalled during any such proceedings.

Pursuant to Section 76.1003(j) of the Commission's rules, concurrent with the Complaint, Sky Angel is serving requests for discovery on Discovery in order to resolve this Complaint expeditiously. Those requests are carefully focused on developing the facts necessary for the Commission to resolve the issues raised in this Complaint. If Discovery is intransigent, then Sky Angel reserves the right to request that the FCC authorize additional discovery under Section 76.7(f) of the Commission's rules in order to help resolve the substance of this Complaint.

Because termination of the Affiliation Agreement is anticipatory, Sky Angel is not, at this time, requesting monetary damages due to improper rates or refusal to enter into programming arrangements. However, Sky Angel reserves the right to seek additional damages if Discovery unreasonably withholds its programming from the Sky Angel system, at which time Sky Angel would begin to incur monetary damages and potentially irreparable harm to its business. In addition, Sky Angel requests that the Commission order Discovery to reimburse Sky Angel for all reasonable attorneys' fees and costs incurred by Sky Angel as a result of Discovery's unjustified anticipatory breach of the Affiliation Agreement and attendant violation of the Commission's program access rules.²⁰


§76.1003(h)(2) ("The remedies provided in paragraph (h)(1) of this section are in addition to and not in lieu of the sanctions available under Title V or any other provision of the Communications Act.") and 47 U.S.C. §312(b) ("Where any person . . . (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.").

²⁰ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1911 (1994) (finding that the Commission's statutory

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authority "is broad enough to include any remedy the Commission reasonably deems appropriate, including damages.").

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Attachment A

“Operations Summary”

[Withheld – Confidential]

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Attachment B

Affiliation Agreement

[Withheld – Confidential]

PUBLIC COPY

Attachment C

Communications Regarding Distribution of Additional Discovery Programming

Naftalin, Charles (WAS - X77040)

From: Thomas Scott [Thomas.Scott@SkyAngel.com]
Sent: Wednesday, March 17, 2010 12:17 PM
To: Naftalin, Charles (WAS - X77040)
Subject: FW: SkyAngel - Discovery

I thought this started it but it actually is dated in October so it must have been cause he hadn't heard from us and was anxious to keep it moving.....

Tom Scott
President/COO
Sky Angel
1300 Goodlette Road N.
Naples, FL 34102
Direct: 239-963-3200
Fax: 239-403-9104

"Now glory be to God! By His mighty power at work within us, He is able to accomplish infinitely more than we would ever dare to ask or hope."
Ephesians 3:20 NLT

-----Original Message-----

From: Brian Collins
Sent: Wednesday, March 17, 2010 11:46 AM
To: Thomas Scott
Subject: Fw: SkyAngel - Discovery

Sent via BlackBerry by AT&T

-----Original Message-----

From: "Jacqueline Gallup" <Jacqueline.gallup@skyangel.com>
Date: Wed, 17 Mar 2010 10:16:14
To: Brian Collins<Brian.Collins@SkyAngel.com>
Subject: FW: SkyAngel - Discovery

Jacqueline Gallup
Programming Director
SkyAngel U.S, LLC
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Cleveland, TN 37312

-----Original Message-----

From: David_Broughton@discovery.com
[mailto:David_Broughton@discovery.com]
Sent: Wednesday, October 28, 2009 11:11 AM
To: Jacqueline Gallup
Subject: RE: SkyAngel - Discovery

Hi Jacque, Are you still interested in launching the Science Channel before the end of the year?

Please let me know.
Thanks,
David

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